



## Lamoine Board of Appeals

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### Minutes of June 21, 2010

Chairman Hancock “Griff” Fenton called the meeting to order at 7:00 PM.

Present were: Board of Appeals members James Crotteau, John Wuorinen, Nicholas Pappas, Hancock Fenton, Jay Fowler, Merle Bragdon (Alt); Secretary Stuart Marckoon, Appellant’s attorney Michael Ross, Appellant Tim Gott, Appellant’s surveyor Steven Salsbury, Code Enforcement Officer Dennis Ford, Deputy Code Enforcement Officer/Assessor Michael Jordan, Planning Board Members John Holt, Donald Bamman, Michael Garrett, Chris Tadema-Wielandt, and member of the public Kathleen DeFusco.

**Minutes of May 24, 2010** – Mr. Crotteau moved to approve the minutes as written. Mr. Wuorinen 2<sup>nd</sup>. **Vote in favor was unanimous.**

Chairman Fenton noted that Mr. Seibel has written to request postponement of his appeal until August or September of 2010 due to a medical situation. He said the Appeals Board will not take up the matter tonight other than to reschedule at the end of the meeting.

#### **Doug Gott & Sons, Inc. vs. Lamoine Planning Board**

Chairman Fenton gave a brief background of the case. He said that Mr. Gott had purchased a parcel of land and requested both a Site Plan Review permit and a Gravel Extraction Permit. He said the Planning Board denied the permits on three review criteria under the Site Plan Review Ordinance and one review criteria under the Gravel Ordinance, thus the appeal.

Presentation by Appellant – Attorney Michael Ross said the appeal is very focused on certain findings made by the Planning Board on April 13, 2010. He said he wishes to limit the appeal to those matters.

He said the Planning Board’s rejection of criterion #6 of the Site Plan Review Ordinance (Section J (6)) found that the required 50-feet of screening was not met. He read the Planning Board findings “...once cleared to the 50 foot line separating the mining operation from three residential homes, the natural buffer – one of tall trees and sparse undergrowth – is not sufficient to “screen” the operation from abutters.”

Mr. Ross said that in reviewing the Site Plan Review Ordinance, that’s not how it reads. He cited page 19 of the Site Plan Review Ordinance (section J (6)). He said the ordinance requires a buffer zone and or screening of 50-feet when adjacent to a residential zone. He said screening can be natural or man-made. He said clearly reading the ordinance, it is not the intent to leave the buffer zone a pristine, forever wild strip. He said if that were the interpretation, the ordinance would not talk about screening with fences and the like. He said large trees are not required by the

ordinance. He said it is the appellant's position that the Planning Board position is clearly erroneous. He said the plan calls for a 50-foot setback and that is not disputed by the Planning Board. He said the Planning Board could have imposed conditions on the type of materials in that 50-foot setback, but instead the Planning Board simply said "no".

Mr. Crotteau asked what the procedure is – should the appellant finish the entire case, or should there be questions asked after each item. Mr. Ross said he would like to finish the case.

Mr. Ross said the next issue was groundwater protection, which is criterion number 10 (Site Plan Review Ordinance, section J (10)) He read the Planning Board decision..." *because the flow of groundwater is toward Route 184, the proposed activity could negatively affect the water quality in wells serving residences across the road (approximately 150 – 300 feet from the pit boundary).*"

Mr. Ross said the appellant submitted an extensive study that addressed the specifics of the aquifer and the water flow which found every single criteria of the ordinance was met or exceeded. He said the S.W. Cole Engineering report addresses both the Cold Spring Water Company and residential wells. He said as he read the details of the report in reference to the water quality and the gravel ordinance, there are certain standards that exist. He said there was no evidence submitted to the Planning Board that the standards were compromised. He said all the ordinance requires is that the standards be met. He said the fact that there is a concern that it might cause problems in wells – there were a lot of "coulds" in the decision. He said the application included a test well and various controls to protect water were in place. He said this is no different than any other gravel operation in town. He said the applicant met the standards required, and this was not a reason to deny. He said there was no evidence presented to do anything but support the application.

Mr. Ross said the final part involves compliance with the Comprehensive Plan. He said to some extent this is the most confusing and frustrating part of the Planning Board decision. He said the Comprehensive Plan was adopted in 1996 and sets forth goals for the town. He said the Comprehensive Plan says this is how the town wants to pursue various things. He said it is not legislation that says these are the rules. He said the town implements specific rules through ordinances. He said the decision in regard to the Comprehensive Plan considers the Comprehensive Plan items to be the rules and regulations in effect, and they are not. He said that is up to the electorate which could, for example, create a zone where gravel pits are allowed. He said page 47 of the Comprehensive Plan says that it needs to be implemented, and not everything contained in the Comprehensive Plan has been followed through.

Mr. Ross said he would show why the Comprehensive Plan should not be considered. He cited the case of Nestle Waters vs. Town of Fryeburg. He said the Maine Supreme Judicial Court stated that the Fryeburg Comprehensive Plan is visionary, but not regulatory. He said part of the Comprehensive Plan includes an implementation strategy, including adoption of land use ordinances. He said Lamoine has a Building and Land Use Ordinance, a Gravel Pit Ordinance, and a Site Plan Review Ordinance, but not all the wishes of the Comprehensive Plan. He said that would make it difficult for

any project to proceed with such vague rules. He said the Comprehensive Plan comes up with a vision, but the visions must be implemented. He said Doug Gott & Sons has done everything to comply with the ordinance and then read from the Nestle case. He said the Comprehensive Plan is not a zoning ordinance; that is not permitted by statute. He said the Comprehensive Plan cannot be the proper vehicle to deny an application.

Mr. Ross said review standard number 6 of the Gravel Ordinance (Section D (6)) requires that the pit will not adversely affect surrounding properties. He said that doesn't mean that it would not affect. He said there was no evidence presented that the pit would adversely affect the abutting properties. He said the ordinances speak of visual degradation, dust, noise and traffic. He said the reason for the Gravel Ordinance and the Site Plan Review Ordinance is that there are certain standards set in those ordinances. He said the performance standards in the Gravel Ordinance start on page 6 and must be adhered to by the application. He read the standards in the ordinance. He said the standards have a quantifiable limit. He said a gravel permit is not a forever thing. He said in three years there is an opportunity for the Planning Board to review things, and if there are violations, there are extensive provisions for Code Enforcement Officer actions or a non-renewal. He said the Planning Board decision was contrary to the evidence presented and contrary as a matter of law.

Mr. Croteau asked whether the appellant is clear that the setback is a minimum of 50-feet and there might be times the Planning Board could say 50-feet is inadequate to do the purposes of the Site Plan law. Mr. Ross said the setback is 50-feet, but the Planning Board could have imposed a condition to say it has to be 75-feet, but they did not do that. Mr. Croteau read from section 6-A-3 in regard to minimizing visual impact, and asked if Mr. Ross agreed that is the purpose of screening and buffering. Mr. Ross said he agreed, and said it includes various types of screening such as fences. Mr. Croteau said the purpose of screening is to minimize the visual impact on abutting properties. Mr. Ross said yes.

Chairman Fenton said the ordinance requires that the screening be no less than 6-feet in height. Mr. Ross said that is part of the ordinance that they are required to do.

Mr. Fowler said one could meet all the requirements for a permit, start and maintain a gravel pit, and if the right people are on the board, they can decide they've had enough gravel pits and turn it down. He noted that the Planning Board allowed a goat farm next to him, yet all everyone worries about is gravel pits, and they are denied because people don't want any more pits. He said legitimate complaints are not addressed. He said wood harvesting is not addressed. He said the ordinance takes more land away from people with the 50-foot buffer. Chairman Fenton said the Planning Board could rebut this.

Mr. Wuorinen said in regard to water quality issues, he understands when you skin away the living material at the surface to get down to the gravel, the processing of water and making it potable so it doesn't collect things like magnesium is interfered with, degrading water quality. He asked if that had been addressed. Mr. Ross said the report seems to address groundwater movement issues and measuring. He said there are ordinance restrictions on the water level relative to the bottom of the pit. He said he's not aware of

any empirical testing requirements. Mr. Wuorinen said testing the water level does not respond to water quality issues. He said both the Planning Board and Board of Appeals must assure the quality and quantity is maintained. Mr. Ross said that kicks into the ongoing obligation that groundwater protection must be maintained. He said a monitoring well is proposed and that is the best thing they could have. Mr. Wuorinen said there is a history of concern about magnesium in the drinking water, and it seems the only way is to have a rather extensive monitoring process. Mr. Ross said the Planning Board could have added that on as condition instead of just saying "no".

Chairman Fenton read from the SW Cole report, saying the proposed pit would not have an impact on the Cold Spring Water Company.

Mr. Fowler asked what the reference during the Planning Board hearing was to trillium. Mr. Ross explained that trillium is considered an unusual flower in some parts of Maine, but is relatively common in this part of Maine. Mr. Ross said the report says residential wells are in no greater danger. He said they're actually adding a monitoring well. Mr. Wuorinen said monitoring level is not the same as monitoring quality. Mr. Ross said it's not going to impact wells. He said the report says the wells will not run out of water. He said he's seen no evidence, but understands the concern.

Mr. Crotteau said he disagreed. He said the water flow is shown on the plan, and it flows across Route 184 to residences across the street. He said there is a question of whether it would impact water quality. Mr. Fowler said the state says that water passing through 10-feet of ground is safe. He questioned what Mr. Gott would be putting into the ground.

Mr. Wuorinen said if the living material is taken from the surface, it eliminates the ability of the soil to handle things like acid rain. He said the acids would help dissolve materials below the surface. He said that is why there was a magnesium problem in that area a few years back. He said it's not clear that everything that came out of the old landfill was responsible. He said stripping the living the material could cause the problem.

Mr. Fowler said a few years ago he used compost in his pit and wells around the pit were tested and one well came back bad, and it turned out to be a dog tethered next to the well.

Mr. Crotteau said the problem is that there is magnesium in the soil released by acid rain, you are stuck; there is no way to fix it. He said the best way to protect it is to make sure it doesn't happen. Mr. Wuorinen said that a study by Professor Willem Brutsaert said that once contamination takes place, it can never be fixed.

Mr. Ross said acid rain and its resulting problems are not unique to Lamoine. He said the state has set up standards, and the proposal is clearly in compliance with state standards. He said he didn't know of any other standards. He said under this scenario a driveway could be causing irreparable damage to a neighbor. He said there is no perpetual license for a gravel pit. He said if a problem shows up, the Code Enforcement Officer can deal with it, or the renewal can be denied. He said if damage occurs, there are remedies in civil law.

Mr. Fowler said when there was a hearing on the proposal to put gas pumps at the general store, a geologist said this was the best place to be, because the aquifer flushes out at the Jordan River. He said geologists disagreed.

#### Presentation by Planning Board

John Holt, the vice-chair of the Lamoine Planning Board said he would respond in the order of the assertions by the appellant. Mr. Holt said there are two parts to the standard contained in section J (6) of the Site Plan Review Ordinance. He said one deals with a buffer zone and the other deals with screening. He read a section from the buffer zone standard and said the Planning Board did not assert there was an inadequate buffer zone. He said the Planning Board asserts the problem is with the screening and the effectiveness of the materials in the zone. He said there is no precise definition of screening, but the barrier was insufficient. He said there were no additional plantings or fences proposed. He said that could be met with a condition. He said if that was the only reason for denial, a condition could have been proposed.

Mr. Holt then read the standard from the Site Plan Review Ordinance dealing with Groundwater Protection:

*The proposed site development and use shall not adversely impact the quality or quantity of groundwater in the aquifers or any water supply systems. Projects involving common on-site water supply or sewage disposal systems with a capacity of two thousand (2,000) gallons per day or greater shall be required to demonstrate that the groundwater at the nearest down hydro-geologic gradient property line shall comply, following development, with the standards for safe drinking water as established by the State of Maine. The board may place conditions upon an application to minimize potential impacts to the town's groundwater resources.*

He said the Planning Board noted the lot in question was entirely over the aquifer. He said the wells of neighbors were a concern, and they requested a professional study, and received one from SW Cole. He said that study dealt with the quantity of ground water. He said the report said the flow was likely east to west and determined the water quantity to those homes on Route 184 would not be affected. He said the majority of the Planning Board felt the monitoring well plan proposed was insufficient. He said no water quality testing was proposed. He said the Planning Board felt the ground water standard had not been met.

Mr. Holt said the development must be in conformance with the Comprehensive Plan. He said the Planning Board agrees there is not likely to be an increase in noise and degradation because there is already plenty of noise and visual degradation in that area. He said the property abuts existing gravel pits. He said the pits are worked every day except for Sunday, and that's a fact of life. He said that doesn't seem like much of a residential area. He said sand and gravel extraction has not been defined as industrial, it clearly is not a residential land use or home occupation or a commercial activity. He said the label of "gravel industry" is appropriate.

Mr. Holt said the appellant's most significant reason for the appeal is the imposition of performance standards based on the Comprehensive Plan. He referred to the Nestle vs.

Fryeburg case. He said he's read the case, and it does not support the appellant's claim, but supports the Planning Board decision. He gave a brief summary of the case.

Mr. Holt said the central issue is the relationship between the Comprehensive Plan and the ordinances. He said the ordinances carry out the policies of the plan. He said the Maine Supreme Judicial Court ruling ruled that the Comprehensive Plan is not an ordinance. He said the Fryeburg land use ordinance made no reference to the Comprehensive Plan. He said the Lamoine Site Plan Review Ordinance is different. He said it cites the Comprehensive Plan as a review criterion. He said it is standard number 16 in the Site Plan Review Ordinance. He said the ordinance intentionally includes conformance with the Comprehensive Plan. He said the Nestle/Fryeburg case does not apply. He said the Planning Board acted correctly in the denial of a Site Plan Review Permit.

Mr. Holt said he would agree with Mr. Ross in regard to the Gravel Ordinance. He said the Planning Board was probably in error. He said the screening provision refers to setback on a public way, not from neighbors. He said they could look at the impact on land values of parcels next to gravel operations.

Mr. Crotteau said he has read the Nestle/Fryeburg case, and nowhere in the Fryeburg ordinance is there a reference to the Comprehensive Plan, and that is opposite to what there is here. He said the Superior Court drew things from the other ordinances. He said it's clear from the ordinance that Lamoine's that the Comprehensive Plan is part of what is binding.

Mr. Crotteau said he used to live on the corner of Lamoine Beach Road and Douglas Highway, and there was a lot of traffic there. He said if you look at a nearly full bucket of water, each drop has no significant increase, but if all the little drops accumulate, the bucket overflows. He said saying it's an insignificant increase doesn't make any sense.

Chairman Fenton said the former Anderson property had a contaminated well, and he wondered about the land values in that area. Secretary Marckoon said the town monitors the wells in that neighborhood and the drinking water is not contaminated. He asked what the question was in regard to the land value. Chairman Fenton asked if there was a significant devaluation in land values. Secretary Marckoon said the house across from the former landfill entrance recently sold, and the selling price was in the neighborhood of the assessed value.

Mr. Wuorinen said the Andersons couldn't stay in their house. Secretary Marckoon said the town purchased the property in a negotiated settlement. He said it depends on who you ask about where the contamination came from.

Chris Tadema-Wielandt said he heard Mr. Ross say the Planning Board could have proposed means by which the appellant could have met the standards. He said he wonders if it's the Planning Board's job to do that.

Abutter/Other Presentation – Chairman Fenton called for others to present. There were none.

**The hearing closed at 8:03 PM**

Findings – Chairman Fenton said there are three contentious items, the screening, groundwater and comprehensive plan under the Site Plan Review Ordinance.

Mr. Crotteau said the role of the Appeals Board is to review whether the Planning Board erred in its interpretation or the Planning Board was so wrong on the facts, there was no justification for their decision. He said he has read all the materials provided. He said the way he's looked at this is precisely as one who is hearing an appeal, not as someone dealing with an application in the first instance. He said the question to answer is whether the Planning Board committed an error.

Chairman Fenton said the Appeals Board job is to find whether the Planning Board was in error. Mr. Fowler said he has a problem with the Comprehensive Plan part of the appeal. He said the Comprehensive Plan is so vague that it's difficult to say whether the Planning Board erred or not. He said the other items are immaterial. He said standard J (16) of the Site Plan Review is the hard one.

Chairman Fenton said he had a hard time grappling with that as well. He said if there is one statement taken from the Comprehensive Plan, there could be a lot of decisions contrary to the plan. Mr. Wuorinen said Mr. Holt seemed to have addressed that concern. Chairman Fenton noted that part of the Comprehensive Plan stated that Route 184 would be fixed some day.

Chairman Fenton suggested taking one thing at a time.

Screening (Item J (6)) Site Plan Review – Chairman Fenton asked if the Planning Board erred. Mr. Crotteau asked whether the Appeals Board would vote to affirm or overturn. Chairman Fenton said he was looking for discussion.

Mr. Fowler said the town has worked with other applicants to have things work out, such as requiring taller trees. He asked why it was not the Planning Board's duty to do this here instead of saying it's not their duty to do it. He said they're not using everyone the same. He said the town came up with reasonable requirements on the McDevitt pit years ago. Chairman Fenton said the Planning Board used several reasons for denial.

Mr. Crotteau moved to affirm the decision of the Planning Board in regard to Site Plan Review Ordinance section J (6). Mr. Wuorinen 2<sup>nd</sup>. **Vote in favor was 4-1 (Fowler opposed, Bragdon not voting).**

Groundwater Protection (Item J (10)) – Chairman Fenton said he would like to understand how there are standards and a test well. He said even if the standard is met, it does not guarantee that there won't be a problem with ground water. He asked if that is a reasonable assumption. He said the question is, since you can't guarantee it, how do you deny it, because there is not enough information or the study is not proper. Mr. Crotteau said he understood the hydrological study dealt mostly with quantity but did not deal with quality, and the ordinance is clear that both quantity and quality are required.

Chairman Fenton said you could almost deny everything because you can't guarantee the quality. Mr. Wuorinen said it depends on the flow of groundwater from the site being considered. Chairman Fenton said it could flow into the aquifer. Mr. Wuorinen said if there is no impact on a residential area, there is no problem.

Michael Garrett of the Planning Board started to address the Appeals Board. Secretary Marckoon reminded the Chairman that the public testimony portion of the meeting was over. There was no objection from the Appeals Board to hearing Mr. Garrett.

Mr. Garrett said the primary purpose of test wells is to determine the flow of groundwater. He said they did require quality testing at a nearby stump grinding operation run by the appellant. He said there is a way to test for water quality.

Mr. Wuorinen said once water quality is lost, there is no recovery. Mr. Fowler asked how far one could go with hypothetical situations. He asked if the Board should remain at the town hall overnight to avoid accidents on the way home. He said tests exist for water quality. A short discussion followed on the direction of water flow.

Mr. Croteau said the issue for him is the one that Mr. Wuorinen mentioned in regard to the stripping of topsoil. Mr. Wuorinen moved to find that the Planning Board Decision was correct in relation to Site Plan Review Ordinance section J (10). Mr. Croteau 2<sup>nd</sup>.  
**Vote in favor was 4-1 (Fowler opposed, Bragdon not voting)**

Comprehensive Plan (Item J (16)) – Chairman Fenton asked if the Nestle/Fryeburg case is the only case to mention this item. Mr. Croteau said he only looked at the Nestle/Fryeburg case. Chairman Fenton said if you do anything, you could have that kind of issue. A very brief discussion followed on whether it's an industrial use.

Planning Board member John Holt addressed the Board with the Board's permission. Mr. Holt said the findings dealt with the residential character of the community and the desirability of the residential area where the gravel operation takes place. He said the Comprehensive Plan cited proportionality and the larger issue of visioning the residential area. Chairman Fenton said his concern is the balance and where that balance goes.

Mr. Fowler said he worries that if the land beside the pit he owns is sold, and people start to build houses, would the town say that his pit should move over. He said what bothers him about the Comprehensive Plan is that everyone can have a different opinion. He said if there is the right lineup of people, that can determine who loses or wins. Mr. Holt said that is why the appeals process exists. Mr. Fowler said a few people could put gravel pits out of business simply by referring to the Comprehensive Plan. Mr. Holt said he thinks that a hypothetical situation.

Chairman Fenton said the Comprehensive Plan was approved in 1996 and now the Planning Board is applying the wishes of 1996 to 2010. He said ordinances were passed to implement the Comprehensive Plan. He noted the Comprehensive Plan also suggested that one ordinance cover everything. He said he is concerned one could take an application and say it doesn't comply with the Comprehensive Plan, and go to a stricter application, even though there is no ordinance to deal with an item. He said



taken to an extreme or literal translation, that could hamper the ability for someone to get a permit for what they want to do. Mr. Holt replied "of course".

Mr. Ross (with permission of the Appeals Board) said the Appeals Board is struggling with the Comprehensive Plan and it's almost unconstitutionally vague. He said he is objecting to any testimony that is coming in that was not heard at the Planning Board.

Mr. Fowler referred to the goat farm issue in regard to buffers, and asked why the town is so concerned about it.

Mr. Wuorinen moved to find the Planning Board was correct in application of standard J (16) of the Site Plan Review Ordinance. Mr. Crotteau 2<sup>nd</sup>. **Vote in favor was 3-2 (Fenton, Fowler opposed, Bragdon not voting).**

Gravel Extraction Ordinance – Mr. Crotteau said the Planning Board essentially agreed they were wrong, and this doesn't need to be discussed much. He moved to find the Planning Board was in error in regard to the Gravel Ordinance. Mr. Pappas 2<sup>nd</sup>. **Vote in favor was 4-0 (Wuorinen and Bragdon not voting).**

Notice of Decision/Findings of Fact/Conclusions of Law – Chairman Fenton said he hoped Secretary Marckoon would write these up. Secretary Marckoon said he hoped to have them done by July 1, 2010. The Board set a meeting time of 12 Noon on July 1, 2010 to approve the final documents. The Board instructed Secretary to deal only with the Appeals Board on the draft documents prior to the meeting.

**Seibel vs. Code Enforcement Officer** – Mr. Fowler asked if the appellant could be fined so much per day. Mr. Fenton said the request to delay action appears to be a medical issue. He said Mr. Seibel suggested August or September to hear the case. The Board discussed several dates and preferred to deal with preliminary items in August with a hearing, provided jurisdiction is proper, in September. The board asked Secretary Marckoon to draft a letter for the chair to send to Mr. Seibel.

There being no further business, the meeting adjourned at 8:37 PM.

Respectfully submitted,

Stuart Marckoon, Secretary  
Lamoine Board of Appeals